SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 74

JOHN FRANCIS PETERS,

Appellant,

v.

STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE APPELLEE

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Questions Presented

The following questions are presented by this appeal:

1. Is Section 180-a of the Code of Criminal Procedure of the State of New York, which provides for the stopping, questioning, and frisking of persons in public places violative of the Fourth and Fourteenth Amendments of the Constitution of the United States:

(a) Is Section 180-a of the Code of Criminal Procedure of the State of New York, because it permits the frisking of persons upon suspicion rather than and

in the absence of probable cause violative of the Fourth and Fourteenth Amendments of the Constitution of the United States of America?

(b) Is Section 180-a of the Code of Criminal Procedure of the State of New York as applied to the appellant, in permitting the stopping, questioning and frisking of the appellant violative of the Fourth and Fourteenth Amendments of the Constitution of the United States?

2. In view of the fact that the frisk of the appellant and the seizure of evidence from his person was not authorized by a lawfully issued search warrant or conducted pursuant to his consent, or as an incident to a lawful arrest, was the frisk of appellant's person and the seizure of evidence therefrom an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution of the United States?

Statement

The appellant was arrested on July 10, 1964, in the City of Mount Vernon, New York. Whether he was arrested by officers of the Mount Vernon Police Department or by Patrolman Samuel L. Lasky, an off duty New York City officer, is problematical but largely unimportant. In either event he was charged with and ultimately indicted for the felony of Possession of Burglars' Tools in violation of the then Penal Law of the State of New York, § 408 (R. 1).

Following his indictment and arraignment on that charge before the County Court of Westchester County the appellant moved the County Court for an order pursuant to the New York Code of Criminal Procedure, §§ 813-c and 952-t, suppressing as evidence certain tools and instruments seized from him by Patrolman Lasky and further authorizing his inspection of the Grand Jury minutes or alterna-

tively, dismissing the indictment (R. 3, 4). The County Court denied this motion (R. 42) upon its decision that the evidence was properly seized (R. 36-41).

Thereafter the appellant pleaded guilty to the crime and misdemeanor of Unlawful Possession of Burglars' Tools. On January 4, 1965, he was sentenced by the County Court to a term of imprisonment of one year in the Westchester County Penitentiary. On January 5, 1965, the appellant filed a notice of appeal to the New York Supreme Court, Appellate Division, Second Judicial Department, and simultaneously therewith applied to the County Court of Westchester County for a certificate of reasonable doubt pursuant to the New York Code of Criminal Procedure, § 527. This was granted on January 13, 1965 (R. 43, 44), and the appellant was released from custody upon his posting bail in the amount of fifteen hundred dollars. On December 5, 1965, the Appellate Division of the New York Supreme Court, Second Department, unanimously affirmed the judgment of conviction and the intermediate order denying suppression (R. 45).

On December 16, 1965, permission to appeal to the New York Court of Appeals was granted to the appellant by Chief (then Associate) Judge Stanley H. Fuld of that Court. On July 7, 1966, the Court of Appeals by a divided court affirmed the order of the Appellate Division (R. 46-56).

On September 7, 1966, the appellant filed a notice of appeal to this Court, and on March 27, 1967, the Court noted probable jurisdiction (R. 59-63).

Facts

Samuel L. Lasky is a patrolman on the New York City Police Department of some eighteen years' experience (R. 17), and a resident of the City of Mount Vernon, New York (R. 14). On July 10, 1964, at about 1:00 p.m. Lasky

had just stepped out of the shower in his apartment on the sixth floor of the apartment building in which he lives and was drying himself when he heard a noise at his front door. At nearly the same time his telephone rang, and he answered it (R. 15). When he had completed the call he went to the door and looked through the peephole. He saw two men tiptoeing about the hallway. He telephoned the Mount Vernon police, dressed, and returned to the door where he again observed the two men, of whom the appellant was one, tiptoeing out of an alcove towards the stairway. Lasky, armed with his service revolver, ran out of the apartment and challenged the men. They fled, and he chased them down the stairs and apprehended the appellant between the fourth and fifth floors (R. 15, 16). The second man made good his escape.

When questioned by Lasky about his presence in the building the appellant claimed to be looking for a girlfriend, but he declined to identify her because she was a married woman (R. 21). It was established that the appelland did not reside in the building (R. 22, 28). Lasky frisked him for a weapon and felt in his right hand trousers pocket what might have been a knife (R. 21). He removed this object from the appellant's pocket and discovered it to be a plastic envelope containing six picks, a tension bar, and two Allen wrenches, with the short leg of each filed down to a screwdriver edge (R. 17). Lasky was qualified as an expert in investigations of burglaries and he identified this material as burglars' tools (R. 17).

Argument

Although more formally phrased under the heading "Questions Presented" the same concept can be as well stated by asking whether or not a police officer may stop and interrogate in a public place a person whom he reasonably suspects is committing, has committed or is about to commit a felony or any of approximately a dozen desig-

nated misdemeanors. The second question, if the first be answered affirmatively, is, having stopped such person, may the officer frisk him by patting his outer clothing in search of a weapon if the officer reasonably believes his life or limb to be in danger?

The Court will note that we have rejected a question suggested by the appellant and designated by him as Question 1 (b) in the appellant's brief. That question would tend to indicate that the New York Code of Criminal Procedure, Section 180-a, which is quoted in full in the appellant's brief (pp. 3-4), authorizes a police officer to arrest upon suspicion. It does not, of course, make such authorization, and the question is therefore inappropriate. For the purpose of clarity we will divide our argument in such a way as to suggest answers to the two questions the applicability of which we acknowledge.

POINT I

In the stated circumstances a police officer may stop and interrogate a person.

There is very little doubt that a police officer may stop, interrogate and even detain for a brief period an individual on somewhat less grounds than those upon which he would be entitled to arrest that individual. The reasons why this is so are varied. It has been said:

> "When an officer encounters a man in a dark alley late at night, or under other circumstances which lead him to suspect that the man may be engaged in or have committed a crime, he should not immediately make an arrest, since answers to a question or two may instantly dispel his suspicions."
>
> *Warner, The Uniform Arrest Act,* 28 Va. L. Rev. 315, 324.

The United States Court of Appeals for the 9th Circuit placed its justification for this right on other grounds. It said:

> "Substantial considerations favor the recognition of a carefully limited right of brief police detention on less than probable cause to believe the person detained has committed a felony. If even slight interference with freedom of personal movement is invariably conditioned upon a showing of prior probable cause, then either the standard of probable cause will be lowered, and with it the protection against formal arrests and substantial interferences with liberty; or police activity which appears perfectly proper when measured against a standard of reasonableness will nonetheless be forbidden."
>
> *Gilbert* v. *United States,* 366 F. 2d 923, 925.

The United States Court of Appeals for the 2d Circuit tends to agree with Professor Warner in saying:

> "Nor do we question the power of the police, under proper circumstances and while investigating a crime, 'to detain suspects for reasonable periods of time in order to question them, check their stories, and to run down leads which either confirm or contradict those stories.' United States ex rel. Corbo v. LaVallee, 270 F. 2d 513, 518 (2 Cir. 1959), cert. denied sub nom. LaVallee v. Corbo, 361 U. S. 950, 80 S. Ct. 403, 4 L. Ed. 2d 382 (1960). This long-recognized prerogative is vital not only to crime prevention and detection, but also 'protects those who are readily able to exculpate themselves from being arrested and having formal charges made against them before their explanations are considered'. United States v. Vita, 294 F. 2d at 530. See also United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960)."
>
> *Middleton* v. *United States,* 344 F. 2d 78, 83.

On whatever basis it be put it is submitted that this right of a police officer to stop and briefly to interrogate a suspicious individual in a public place unquestionably exists. See also *Rios* v. *United States*, 364 U. S. 253; *Lipton* v. *United States*, 348 F. 2d 591 (9th Cir.); *Keiningham* v. *United States*, 307 F. 2d 632 (D. C. Cir.); *United States* v. *Vita*, 294 F. 2d 524; *United States* v. *Bonanno*, 180 F. Supp. 71; *United States ex rel. Corbo* v. *LaVallee*, 270 F. 2d 513; *People* v. *Rivera*, 14 N. Y. 2d 441; *Gisske* v. *Jackson*, 164 Cal. App. 2d 759, 331 P. 2d 63; *Ellis* v. *United States*, 264 F. 2d 272; *Green* v. *United States*, 259 F. 2d 180.

Indeed, the appellant's principal protagonist in the New York Court of Appeals, Associate (now Chief) Judge Stanley H. Fuld, said in his dissenting opinion in *People* v. *Rivera, supra*, 14 N. Y. 441, 451:

> "I have no doubt that the police, in the proper performance of their duties, have a responsibility to investigate suspicious activity and that one permissible form of investigation is the temporary stopping and questioning of individuals so engaged."

This Court has so ruled, *Rios* v. *United States, supra*, and has consistently declined to correct inferior courts which have so ruled, *Keiningham* v. *United States, supra*, 371 U. S. 948; *United States* v. *Vita, supra*, 364 U. S. 823; *United States ex rel. Corbo* v. *LaVallee*, sub nom. *LaVallee* v. *Corbo*, 361 U. S. 950; *People* v. *Rivera, supra*, sub nom. *Rivera* v. *New York*, 379 U. S. 978; *Ellis* v. *United States*, 359 U. S. 998; *Green* v. *United States*, 359 U. S. 917.

Because of the foregoing material, all of which uniformly grants to the police this right to stop and interrogate a suspected person, it is submitted that insofar as the question simply of stopping a suspect goes, that right and indeed duty of the police officer is undeniable.

POINT II

The police officer's frisking of the defendant was within constitutional limitations.

Amendments IV, and, in appropriate part, XIV to the United States Constitution read:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is apparent, therefore, that there is no general proscription against searches and that the only thing which is condemned is the *unreasonable* search. Reasonableness, though, or the lack of it cannot be measured in absolute terms. As this Court said in *Go-Bart* v. *United States*, 282 U. S. 344:

> "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."

That being so, it is submitted that there is and can be no hard and fast rule of what is a reasonable search and, conversely, what is an unreasonable search.

Thus, while we might abhor as unreasonable a general and uninhibited right to invade a person's clothing and to remove material therefrom, we can also recognize that in some circumstances such invasion and removal of property would not only be reasonable but eminently proper. As an example we could suggest the propriety of going through the personal effects of a person injured or taken sick in the street, and other illustrations of the point could easily be envisioned. The point is that circumstances alter cases, and because of that indisputable fact, the Constitution may not be said to establish any fixed line of demarcation below which *all* searches become illegal.

We have argued at Point I, *supra,* that a police officer has the right to stop and question a suspicious person. There is much to sustain and little to defeat the thesis that the policeman has more than a right, he has a duty to stop such persons and make inquiries of them. Certainly the State of New York has imposed such a duty upon its officers:

> "The business of the police is to prevent crime if they can. Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going wrong in the streets; if they were to be denied the right of such summary inquiry, a normal power and a necessary duty would be closed off."

People v. *Rivera, supra,* 14 N. Y. 2d 441, 444.

If such a duty does exist, then it is a frightening adjunct to that duty that the officer, while performing it, is prohibited from taking the most elemental precaution to safeguard his own life. Our society places a police officer on the street to guard it while it sleeps or goes about its other routine business, and it charges him with investigating the

activity of suspicious persons. It ought reasonably to offer him some acceptable way of assuring himself that these suspicious persons cannot kill or injure him with a concealed weapon while he is discharging that responsibility, because the anomaly of the thing is that the better and more conscientiously he does his job the greater is the hazard he faces. It is submitted that under limited conditions the "frisk" is the obvious answer.

On May 5, 1966, the day the present case was argued in the New York Court of Appeals, a story appeared in the White Plains Reporter Dispatch describing the death of a New Jersey state trooper. It was an Associated Press dispatch and probably appeared in newspapers all over the country. No attempt has been made to edit it, but we have italicized a point which we believe should command the Court's special attention:

"MAN IS HELD IN SLAYING OF TROOPER

"MOORESTOWN, N. J. (AP)—State police held a Brooklyn, N. Y., man today in connection with the early morning slaying of a state trooper on the New Jersey Turnpike.

"Police identified him as Daniel C. Kremens, about 33.

"He was walking in Paulsboro, south of Camden.

"Paulsboro is about 30 miles from where trooper Anthony Lukis Jr., 30, father of four children, was shot to death.

"Col. David B. Kelly, state police superintendent, said Lukis apparently was shot three times, once in the head and twice in the back, after he had stopped to check on a car parked on the shoulder of the Turnpike. *His own revolver was still in its holster.*

"First word of the slaying came from an unidentified truck driver who saw either a scuffle or something else amiss as he drove past the scene, Kelly said.

"The driver stopped further up the road and walked back. He found Lukis' body lying alongside his patrol car. The other car had disappeared.

"The trucker used the police car radio to report the incident.

"Lukis and his wife, Patricia, have a daughter, Kim-Marie, 7; and three sons, Paul, 6; Michael, 4; and Anthony, 18 months."

We are not arguing that if New Jersey had a statute comparable to New York's section 180-a, Trooper Lukis would have lived. The point is that he *might* have. It is quite likely that even *with* this law police officers will continue to be killed on duty because theirs is a dangerous occupation, but it seems nothing short of criminal to require them to expose themselves nakedly when the means of protecting them, at least a little, is so readily at hand. Professor Warner, the author of the Uniform Arrest Act, seems to agree when he writes:

"Today, good police practice often requires a police officer to 'frisk' a suspect before questioning him, that is, to pass his hands over the latter's outer clothing to make sure that no dangerous weapons are concealed on his person. When an officer encounters a man in a dark alley late at night, or under other circumstances which lead him to suspect that the man may be engaged in or have committed a crime, he should not immediately make an arrest, since answers to a question or two may instantly dispel his suspicions. Yet, it would be the height of folly to converse with the suspect without first making certain that the latter is not fingering the trigger of a pistol.

"A police officer does not, and should not, 'frisk' everyone he questions, or even everyone he suspects of having committed a serious crime. But for him to limit 'frisking' to persons he reasonably believes are carry-

ing concealed weapons is to risk his life needlessly. Therefore, the officer should 'frisk' every person he questions, when, because of the appearance of the person, the time and place, the small number of police officers present, the seriousness of the offense he is investigating, or other circumstances 'he reasonably believes that he is in danger if such person possesses a dangerous weapon.'"

Warner, The Uniform Arrest Act, supra, Va. L. Rev. 325, 324-325.

So also does the New York Court of Appeals:

"If we recognize the authority of the police to stop a person and inquire concerning unusual street events we are required to recognize the hazards involved in this kind of public duty. The answer to the question propounded may be a bullet; in any case the exposure to danger would be very great. We think the frisk is a reasonable and constitutionally permissible precaution to minimize that danger. We ought not, in deciding what is reasonable, close our eyes to the actualities of street dangers in performing this kind of public duty."

People v. *Rivera, supra,* 14 N. Y. 2d 441, 446.

"It is well recognized that the basis for a frisk is the concern for the well-being of the officer."

People v. *Peters,* 18 N. Y. 2d 238, 243.

It is therefore submitted that in the situations propounded by Professor Warner and in both the New York cases, *People* v. *Rivera,* 14 N. Y. 2d 441, cert. denied sub nom. *Rivera* v. *New York,* 379 U. S. 978; and *People* v. *Peters,* the instant case, 18 N. Y. 2d 238, the frisks were not unreasonable and hence not violative of the Constitution.

Up to this point we have discussed only the all but acknowledged right of the police officer to stop and question as that right has been conferred by the courts and the consequent right, dictated by reason, for him to frisk, in appropriate cases, for concealed weapons. We have adverted only passingly to Section 180-a of the New York Code of Criminal Procedure, and we turn now to a consideration of the statute.

The Court of Appeals pointed out in the opinion below:

> "For in the last analysis the constitutionality of the statute is determined not so much by the language employed as by the conduct it authorizes."

People v. *Peters,* 18 N. Y. 2d 238, 245.

What plainly the Court of Appeals intended to convey is the thought that if a given course of conduct is legal and proper *without* a statute authorizing it, the same course of conduct remains legal and proper although it has now become statutory rather than decisional. If this Court did not see fit to conclude that the United States Constitution was violated by the holding of the New York Court of Appeals in *People* v. *Rivera, supra,* 14 N. Y. 2d 441, then it is difficult to understand how it may conclude fairly that Section 180-a of the New York Code of Criminal Procedure is unconstitutional. That section authorizes nothing further than the decisional authority already indicates the officer may do, and in some cases restricts it. For example, the officer operating under the statute may stop and interrogate only where the crime involved is one of a specified number and therefore may frisk in only those limited situations.

It is perfectly clear both from the manner in which the Court of Appeals interpreted Section 180-a and that in which it would be understood by the lay reader that the section makes no attempt to authorize the search of a sus-

peet for evidence. It only allows the policeman to *disarm* him if, after a superficial patting of his outer clothing, he determines that he has a weapon. If during such a frisk as the statute permits the officer finds a prohibited weapon, there will then be no problem, for in that event the officer will arrest him. If he finds no weapon, however, and if the frisk reveals nothing that is likely to be a weapon, the policeman is absolutely prohibited from conducting a search for evidence.

It is respectfully submitted that the officer's purpose in performing his duties with respect to this law is determinative on the point of its constitutionality. For example, to return to the man injured in the street, if a policeman removes this man's wallet from his pocket to identify him, we don't measure his actions against probable cause because we don't conceive of this as being a search. Consequently if contraband is found in that wallet, it will not be suppressed. Similarly if a police officer enters a private dwelling to investigate unusual sounds or odors that suggest that something is seriously wrong within, we don't characterize his entry as a search, and we don't concern ourselves with probable cause. This remains true even if, once inside, the officer is enabled to observe or to seize evidence of a crime, cf. *People* v. *Gallmon*, 19 N. Y. 2d 389; *Wayne* v. *United States*, 318 F. 2d 205, cert. denied 375 U. S. 806.

Thus it is, it is submitted, with Section 180-a. The officer's initial purpose not being that of searching for evidence but that entirely of obtaining control over the suspect's weapon if he has one, the procedure authorized by the section is not a search as envisioned by Amendment IV, and the criterion of probable cause need not be considered.

Furthermore, although superficially this case has no connection with *United States* v. *Ventresca*, 380 U. S. 102, there is a lesson to be learned from that case. This Court there concluded that a warrant to search was to be preferred to a search without a warrant because, in effect, the

application for a warrant interposed a neutral filter between the legitimate exercise of police authority and the citizen's right to be let alone. If in that area of the law the magistrate represents such a filter, then in the area of stopping and frisking the legislature, while recognizing that the policeman alone makes the immediate determination of whether to stop or not to stop, has, in having adopted specific restrictive standards governing when the policeman may stop a person, interposed itself as the same neutral filter between the unregulated use of police authority and the citizen's right freely to go about his business. To the extent that *United States* v. *Ventresca, supra,* commends to the courts the greater desirability of judicially endorsed searches that case applies here and suggests that statutorily sanctioned searches are to be preferred to those conducted within the exclusive discretion of the police officer.

Finally, as the New York Court of Appeals said in its opinion below:

> "In the reecnt case of Ker v. California, eight Justices agreed on that part of the opinion which stated: 'The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, 'provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain' (374 U. S. 23, 34).
>
> By judicial action in Rivera and legislative action in Section 180-a, our State has developed a reasonable and workable set of rules governing arrest, search and seizure. These rules are similar to those adopted in several other States, notably California whose criminal problems in large urban areas are similar to ours.

(See *People* v. *Martin*, 46 Cal. 2d 106; also *Kavanagh* v. *Stenhouse*, 93 R. I. 252, and *Commonwealth* v. *Lehan*, 347 Mass. 197)."

People v. *Peters, supra*, 18 N. Y. 2d 238, 247.

In sum, therefore, it is submitted that the New York Code of Criminal Procedure, Section 180-a, because it does not authorize an unreasonable stopping and searching, is not and cannot be violative of the United States Constitution.

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

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